



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Jivanji

**Respondent:** Her Majesty's Revenue and Customs

**Heard at:** Leicester **On:** Tuesday 8 August 2017

**Before:** Employment Judge Blackwell (Sitting Alone)

**Representation**

**Claimant:** Mr Bidnell-Edwards of Counsel

**Respondent:** Mr Sadiq of Counsel

## RESERVED JUDGMENT

The claim of constructive unfair dismissal fails and is dismissed.

## RESERVED REASONS

1. Mr Bidnell-Edwards represented the Claimant Mr Jivanji whom he called to give evidence together with former colleagues Mr M Travadi, Mr N Smith and Mr A Morgan. Mr Sadiq represented the Respondent's HMRC and he called Mr K Patel, Mr Jivanji's Line Manager, Mr Martin Shields who dealt with the first stage of Mr Jivanji's grievance procedure and Ms J Cope who heard Mr Jivanji's grievance appeal.

### Issues and the Law

2. Mr Jivanji brings a single case of constructive unfair dismissal. The relevant statutory provision is Section 95(1)(c) of the Employment Rights Act 1996:-

“(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if):-

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.”

3. As to case law the seminal judgment is that of Lord Denning MR in the case of **Western Excavating (ECC) Limited v Sharp** [1978] ICR 221 as follows:-

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed.”

4. The essential term of the contract upon which Mr Jivanji relies is the implied term of trust and confidence namely that the Respondent without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence, see **Malik v BCCI** [1998] ICR 20. It is common ground that the test to be applied is an objective one. Mr Jivanji’s case is also one of “the final straw” category and the leading case thereon is **London Waltham Forest v Omilaju** [2005] IRLR 35.

5. Mr Jivanji’s factual case relies upon the actions of his Line Manager and the conduct by HMRC of a contractual grievance process, the grievance being essentially based upon the said conduct of Mr Patel.

6. In respect of the last straw. Mr Jivanji’s lengthy claim form identifies it as:-

“the negative decision of the appeal against his grievance some one year after submitting the same.”

7. However in his witness evidence he identifies the last straw he as “what happened in my last 6 days at work”.

8. The Respondent’s case is in summary that they acted with reasonable and proper cause throughout judged objectively and that there was therefore no breach of the implied term of trust and confidence.

9. In addition to establishing that there has been a breach of the implied term of trust and confidence which will always constitute a repudiatory breach of the contract of employment Mr Jivanji also has to establish that he resigned, at least in part, as a consequence of the said breach and that he did so without affirming the contract.

### **Findings of Fact**

1. Mr Jivanji began his employment with HMRC on 3 November 2008 as an officer and subsequently took on various management grade processing roles. He resigned with notice on 10 August 2016.

2. HMRC need no introduction but are self evidently a very large employer with a dedicated Human Resources Department.

3. Mr Jivanji was well regarded by both his managers and his colleagues. His colleagues would often turn to him when they were in doubt a particular case.

4. Mr Jivanji's relationship with his Line Manager Kalpesh Patel was initially a good one but matters seemed to have deteriorated with effect from the latter part of 2014. At a performance management review (PMR) meeting on 11 September 2014 Mr Patel raised the following matters:-

1. That Mr Jivanji had been speaking in Gujarati about his colleagues.
2. That he had been rude to fellow managers.
3. That he had mocked AO staff that had approached him for support.

5. I find as a fact that these allegations were based on the complaints of 2 fellow workers.

6. Mr Jivanji confirmed in his evidence that he accepted that it was appropriate to raise the complaints but that it was inappropriate so to do in a PMR.

7. It is common ground that Mr Patel did not identify the makers of the allegations because they wish to remain anonymous. I accept that evidence.

8. On 12 September 2014 a colleague Ms Undre e-mailed Mr Patel asking for assistance. Mr Patel also noted that Ms Undre was working on her own and took it up with both Mr Patel and his trade union as he believed that working alone put Ms Undre at risk.

9. At page 90 is Mr Patel's write-up part of the PMR process and this document is at the heart of Mr Jivanji's complaint. That document under behaviours states as follows:-

"Jesal's overall performance is very good. However I have received information in regard to his behaviour that he speak in Gujarati, and that he has criticised/spoken rudely of other managers and mocked staff when they have come for advice. If this is happening I would like Jesal to stop. Although Jesal would like the names of people who have informed me, I am unable to disclose this information."

10. Under AOB the following appears:-

"Overall Jesal's performance has been good so far this year. However from the information I have received, Jesal should think about his behaviour and the impact on others, if the information I have received is correct. Currently I believe Jesal is an indicative achieved marking."

11. At page 91-93 is Mr Jivanji's own notes of that discussion referred to in paragraph 4 above.

On 27 October 2014 at pages 129 and 130 Mr Patel replies to various concerns raised by Mr Jivanji and in that e-mail he explains why he could not identify those complaining against Mr Jivanji, he further states:-

“You are correct in stating that PMR should be evidence based. Therefore anything not proven will not affect your PMR rating.”

He concludes:-

“I feel I have taken the appropriate action and consider the matter closed.

At the end of the performance year, if you remain unhappy with the comments or rating that you receive for your PMR then you can submit an appeal.”

12. On 4 November 2014 Mr Jivanji responded with a lengthy e-mail, pages 122-127 explaining at great length why he was not satisfied with Mr Patel's actions.

13. The next stage of the PMR process took place on 5 November 2014, again Mr Patel writes his own lengthy notes, see 116-121. It is common ground that Mr Patel told Mr Jivanji that he felt that he had not moved on and that his self appraisal had negative points within it. Mr Patel provided a brief e-mail at page 122 again repeating that he felt that the case was closed but giving him a link to the grievance procedure.

14. On 8 January 2015 Ms Undre wrote an e-mail to Mr Patel to which Mr Patel responded, see pages 141-143.

15. On 16 February 2015 Mr Patel raised the exchange of correspondence with Ms Undre with Mr Jivanji. At pages 147 and 148 are Mr Jivanji's notes of that discussion, those concerns being that Mr Jivanji had responded to a personal ie non HMRC account and that Mr Jivanji had not referred the e-mails to Ms Undre's Line Manager or to Mr Patel as the Higher Officer.

16. On 17 February 2015 Mr Patel finds a bundle of tax returns in “the team's old cupboard”. At paragraph 75 of his witness statement Mr Jivanji sets out 2 previous occasions where old tax returns had been discovered.

17. On 18 February Mr Jivanji requests a meeting with Mr Patel in which he alleges that there are malicious acts by one or more people to implicate him in wrong doing. His lengthy notes of that meeting are at pages 160-164 and I am bound to say that they are very defensive in nature.

18. On 25 February there is another meeting with Mr Patel in which Mr Patel confirmed that both the returns found in the cupboard and the e-mail exchange with Ms Undre were to be investigated as potentially disciplinary matters. Mr Jivanji's notes of that discussion are at 167 and 168. Again Mr Jivanji implies that there are those of his colleagues who would hide his work deliberately. He further goes on to say “at present I do not trust anybody on the Tech Team”.

19. On 27 February 2015 Mr Jivanji received a letter (though it is not in the bundle) advising him that the 2 matters referred to above were to be investigated by Mr R Langton who had been appointed as the investigating officer.

20. On 5 March 2015 after a lengthy delay Mr Patel sent the mid year comments at pages 223 and 224. The final 3 paragraphs read as follows:-

“In regards to feedback I had received about Jesal, I believe that Jesal did not take the feedback too well and was finding it difficult to move on. I informed Jesal that even though I consider the matter closed and confirm that it was not fact based Jesal could not move on from the matter. There must have been a lot of time spent by Jesal writing long e-mails.

I have no concerns regarding Jesal’s performance or quality of work.

Overall, including performance and behaviour, I suggested to Jesal that I felt he was borderline of must improve and achieved. However due to his good performance I believe he had just crossed the line in the achieved. Therefore for mid year I believe Jesal is an indicative achieved marking.”

21. By another lengthy note reiterating much of what had gone on before Mr Jivanji takes issue with Mr Patel’s views, see pages 225 to 228.

22. At 228(b) are further comments from Mr Patel concerning Mr Jivanji’s performance under the heading of end of year comments. These were sent to Mr Patel on 18 March.

23. By letter of 17 March 2015 Mr Jivanji sent a formal grievance complaint to Mr Patel’s Line Manager complaining about his conduct. The complaint is at pages 191-195. The first ground of complaint concerns the alleged anonymous unsubstantiated complaints of bullying and harassment made in September 2014, the finding of the returns in the cupboard and the manner in which that matter was handled and the allegation that Mr Patel had accused Mr Jivanji of gross misconduct in relation to the exchange of e-mails with Ms Undre. He accuses Mr Patel of harassment and discrimination and that he believes that the complaints made against him were malicious.

24. In respect of Mr Langton’s investigation and the subsequent decision made by a separate manager Mr Lloyd, Mr Langton’s investigation report could be seen at 232 and 233. This led to a disciplinary meeting held on 28 April and a decision by Mr Lloyd by a letter of 5 May 2015, see page 246. he concluded:-

“I have carefully considered all the circumstances including the results of the investigation and your representations at the meeting. I have decided that the allegation (sic) has not been proven and that misconduct has not occurred. Therefore I will take no further action.”

Attached were Mr Lloyd’s reasoning at pages 248 and 249. Mr Lloyd flags up the need for better communication between Mr Jivanji and Mr Patel.

25. Returning to the grievance process there were lengthy delays to which I will return in my conclusions. It is noteworthy that as early as 17 June 2015 Mr Jivanji was taking legal advice, see 301(8) in which e-mail he advises Ms Stephenson who was to have dealt with grievance that since she had been involved in the earlier disciplinary process she should not be involved in the grievance procedure. Ms Stephenson accepted that view and as a consequence Mr Shields of the Bradford office took on the role.

26. Eventually on 15 October 2015 a grievance meeting took place and after still further delays a decision was eventually delivered on 3 March 2016, the deliberation document being at pages 302 to 309 and the decision letter at 301 (40 and 41).

27. Whilst the grievance process was slowly proceeding there was a further one to one discussion on 3 September 2015, see page 89(b), current marking being recorded as mid achieved and there were also no negative comments against performance quality behaviours and attendance. This followed from Mr Jivanji's self assessment template at pages 278 and 279. He concluded that he would settle for an achieved marking for the foreseeable future.

28. Following the grievance outcome Mr Jivanji repeatedly requested the supporting documents and investigatory report. It eventually turned out that there was no investigatory report, though some supporting documents were forwarded on 24 May 2016.

29. On 8 June 2016 Mr Jivanji appealed as he was entitled to do which is at pages 324-349 and includes a considerable number of supporting documents. The appeal essentially disagreed with Mr Shields' conclusions on an almost line by line basis, criticised Mr Shields' approach and set out a number of procedural defects in terms of failure to comply with HMRC's own grievance procedure. Even Mr Jivanji accepts that the appeal went in to "hair splitting" detail.

30. The appeal was to be determined by Mrs Cope and there was an appeal hearing on 30 June 2016, the notes of which begin at page 364. Mrs Cope sought to summarise the heads of complaint. Firstly that Mr Shields had not used common sense in that Mr Shields' reasoning would not be able to withstand common sense based questioning. Further that Mr Shields had not adhered to Civil Service values/policies and guidance, that he had failed to consider the written evidence provided to him and that finally additional evidence was available that would change the outcome. The appeal notes conclude at page 372 and in my view disclose a thorough and objective approach by Mrs Cope.

31. The appeal decision was communicated on 15 July and begins at page 379. Mrs Cope did not uphold the appeal. She did however confirm that there had been 4 procedural failings in the handling of the complaint. Firstly in regard to the time line ie after 40 days the case should have been reviewed by a senior manager. Secondly that the grievance check list had not been completed. Thirdly there had been no independent investigation manager which led inevitably to the fourth failing, namely that there was no investigation report carried out by an independent manager.

32. Mr Jivanji did not accept Mrs Cope's decision and rejected the offer of mediation. He states in his witness statement that he intended to speak to solicitors and that:-

"I felt that the relationship was too frayed to try to reconcile through mediation. I therefore explained that mediation would be a futile exercise whilst the dispute is not only ongoing, but also escalating."

33. On 18 July 2016 Mr Jivanji submitted an application to reduce his working hours to 25 hours a week and this was granted.

34. Mr Jivanji alleges that on the day that that request was granted ie 20 July 2016 he discovered work of LK that indicated that once again LK had been cherry picking.

35. Mr Patel went on leave from 25 July and returned on 8 August 2016. He resigned by letter of 10 August. He stated:-

"Until 2014 year I had genuinely enjoyed my time at HMRC and I am proud to have been amongst the top performers on the Saxon House evening shift during those years. However due to the series of events that have occurred from 2014/2015 year onwards as well as the department's final decision (which was delivered in the past few weeks) after having waited approximately one year to receive the initial decision which in effect condoned the treatment that I received, it has become untenable for me to continue working for HMRC. In the best interests of my health and wellbeing, both physical and mental, I believe I have no alternative other than to resign and start searching for a new career outside the department."

## **Conclusions**

36. Firstly I wish to deal with the approach to take. Mr Sadiq on the Respondent's behalf argues that Mr Jivanji should be held to his pleaded case and the list of issues which subsequently Mr Sadiq put to Mr Jivanji and which Mr Jivanji accepted should be the issues to be determined. Mr Bidnall-Edwards on the other hand relies upon matters raised both in the further and better particulars and which emerged from the evidence. In substance I do not think there is a great deal of actual difference between the two approaches but I have adopted Mr Sadiq's approach because it seemed to me to give greater clarity. I should also at this stage comment upon the matter raised in the introductory section on issues and the law, namely that of the final straw. Mr Jivanji is a very intelligent individual who has had the benefit of legal and trade union advice from June 2015. The last straw he relies on in his witness evidence ie his last 6 days at work were not referred to in his claim form. It seems to me that these events either did not occur at all or were of such insignificance that they were not worthy of mention.

37. The first matter relied upon is that:-

“On 11 September 2014 at the Claimant’s bi-monthly appraisal meeting with Kalpesh Patel, the Claimant’s Line Manager, Mr Patel decided without any foundation and/or investigation that the Claimant was guilty of:-

1. Rudeness to managers and mocking Administrative Officers when they asked for the Claimant’s help and;
2. Speaking in a foreign language which was unacceptable in a team environment.”

38. As I indicated before written submissions were provided this is a case which turns very much on whether HMRC acted with reasonable and proper cause. As I have found above there were complainants by 2 employees against Mr Jivanji that encompassed the allegations set out above. On the basis of the contemporaneous documents it is clear that at no stage did Mr Patel suggest that the Claimant was guilty of these allegations. Again as stated above the Claimant’s real complaint is that they should not have been raised in the context of the PMR meeting. Mr Patel accepted that matters raised in the PMR meeting should be fact based, he further confirmed that they would play no part in the outcome of the PMR process. He also explained why he could not identify the complainants.

39. The second main complaint is:-

“On 5 November 2014 at the Claimant’s mid year appraisal meeting Mr Patel stated that the Claimant’s behaviours were of a “must improve” standard because the Claimant pursued his request for the anonymous allegations against him to be investigated.”

40. As to this Mr Patel accepted in cross examination that this was unconnected with Mr Jivanji’s pursuance of an investigation into the bullying allegations and further Mr Jivanji did receive an “achieved” marking. I do accept however that Mr Patel accepted that in part the negative marking was related to Mr Jivanji’s failure to move on. I also accept that it was a reasonable approach for Mr Jivanji to seek to clear his name. However that is not the issue to be determined. Was Mr Patel’s failure to investigate the complaints any further so as to establish whether or not they were malicious acting with reasonable and proper cause. In my judgment different managers might well have taken a different approach to that adopted by Mr Patel however objectively judged on the basis of both the allegations and Mr Jivanji’s response it seems to me that Mr Patel’s approach was a reasonable one.

41. Next comes the following:-

“On or before 25 February 2015 Mr Patel orchestrated and decided that the Claimant should be the subject of a formal disciplinary investigation for:-

- (i) the misuse of e-mails to Nabela Undre and;



(ii) the part worked and unworked tax returns connected to the Claimant, both of which was unjustified.”

42. The use of the word orchestrated is like so much of Mr Jivanji's claim, a significant exaggeration. It is true that Mr Patel decided that the two matters should be investigated and in consequence that disciplinary procedures might then follow. In fact there was a separate investigation by Mr Langton and a further manager took the decision.

43. There was much debate about whether it was arguable that there had been a breach of the Acceptable Use Policy, the relevant paragraph is as follows:-

“A union official, manager, fact finder or decision maker can e-mail the personal account of an absent member of staff when there are no practical means to do so, in relation to a personal case, eg PMR, appeal grievance or conduct and discipline case. All parties that are mentioned in the case must give prior written authority for e-mail to be used.”

In my view it is arguable that certainly in the spirit and probably in the letter Mr Jivanji was in breach of that policy.

I accept that much turns on the definition of manager but notwithstanding that I believe that there was a case to answer which was the view that Mr Patel took.

44. Turning to the unworked tax return Mr Jivanji's complaint is in two parts. Firstly that the pursuance of disciplinary proceedings was unjustified. Again on the documentary evidence there appears to me to be a clear case to answer. The second matter complained of is as follows:-

“In deciding to commence formal disciplinary proceedings against the Claimant, did Mr Patel treat the Claimant less favourably in comparison to the following individuals:-

(i) LK a bundle of unreported work was found in her personal folder and she had failed to clear her work and inbox before taking a long period off work but no formal disciplinary proceedings were commenced against her.

(ii) Nick Smith 15 part work tax returns assigned to him were found and in relation to Mahesh Travadi one old part work tax return was found assigned to him but no formal disciplinary proceedings were commenced against either of them.”

45. As to LK only 2 cases were ascribed to her and she was then off sick. Mr Patel gave evidence which I accept that he had been informed that the matter had been dealt with and that no action was deemed necessary. As to Mr Smith the evidence shows that whilst the files were in the wrong place they were however up to date. Only one case was linked to Mr Travadi. Again it seems to me that this is a complaint not just made against Mr Patel but against all those involved in the disciplinary process. It seems to me on the basis of the differences set out above that there were good reasons for only proceeding against Mr Jivanji.

In summary although Mr Patel started the process it was carried on by 2 other managers, one who investigated and one who decided. The decision although it made some minor criticisms of Mr Jivanji was to find Mr Jivanji not guilty of misconduct. I see nothing in the process to substantiate Mr Jivanji's allegations.

46. The next matter is:-

“On 17 March 2015 whether Mr Patel in giving the Claimant in his end of year appraisal a border line “must improve” marking subject to validation was unjustified.”

47. Put another way did Mr Patel act with reasonable cause? Mr Jivanji's case appears to be that Mr Patel's view was affected by his incorrect conclusions in respect of the Claimant's misconduct, thus it must follow that the decision was unjustified. Mr Patel in his evidence gave a number of reasons justifying the marking for example working on days which had been prearranged as leave and writing up notes at home rather than at work. I accept that Mr Patel also took into account his view that Mr Jivanji had failed to move on from document 89(a). I have to say that I agree with Mr Patel. Document 89(a) appears to me to be the beginning of what became an obsession with Mr Jivanji. Again objectively judged Mr Patel had reasonable and proper cause to act in the manner that he did.

48. The next matter is:-

“The delay in Martin Shields, the grievance officer, dealing with the Claimant's grievance (lodged on 17 March 2015); the grievance meeting did not take place until 15 October 2015 and the grievance outcome was not provided until 2 March 2016.”

49. Factually that complaint is accurate. Further Mrs Cope in the appeal hearing confirmed this together with others as a procedural failing. Mr Sidiq in his submissions seeks to explain the delay and there were a number of factors including in part to be ascribed to Mr Jivanji. However on no objective view can the Respondent's be said to be acting with reasonable cause in taking the length and time that they did in determining what was in essence a straightforward grievance.

50. As to the substance of the outcome Mr Shields was an unconvincing and reluctant witness. I therefore proceed on the basis of what was actually said in the outcome. I have re-read the notes at the meeting of 15 October 2015. It seems to me that Mr Shields, contrary to Mr Jivanji's later allegation did take a common sense approach and examine thoroughly the grounds for complaint. The substance of Mr Jivanji's complaints are essentially those already dealt with in these conclusions and it follows that I believe that Mr Shields had reasonable grounds for not upholding the grievance.

51. The next matter complained of is as follows:-

“During grievance period and/or in the month of June 2016 Mr Patel failed to deal with the Claimant's concerns that some of his work colleagues were purposefully avoiding difficult time consuming work which was having to be worked by the Claimant.”

52. This is effectively Mr Jivanji complaining about LK's failure to contribute to the Team's work and Mr Patel's continuing failure to do anything about it. It is true that in any team in any employment there are capable and strong performers such as Mr Jivanji. Equally there are those who are not so able and LK appears to have been one of those. Mr Patel gave evidence as to the support he gave to LK which was consistent with informally managing a less capable employee. Mr Sadiq refers me to document 377(d) which is clear evidence on 12 July 2016 that once Mr Jivanji raised a complaint Mr Patel responded by telling him not to work on the files complained of as they had been reassigned.

53. I see nothing in this which is anymore than the day to day management of employees of differing abilities. That is equally true of the complaints raised by Mr Jivanji about the training of Mr Sales. I see nothing that substantiates Mr Jivanji's complaint.

54. The next matter complained of:-

“Joanna Cope's decision to dismiss the grievance appeal on 15 July 2016 was unfair and/or unreasonable as was the delay in receiving the appeal outcome.”

55. Although Mrs Cope was a compelling and straightforward witness I rely largely upon the notes of the appeal hearing and the outcome. Again the substance of the appeal as to the conduct of Mr Patel and other managers remains the same and added to that is both the outcome and the procedural failings of Mr Shields' grievance process. Again it is clear that Mr Jivanji did not accept Mr Shields' outcome and that forms a large part of the grounds of appeal.

56. I am satisfied from the notes of the appeal hearing and the outcome document that Mrs Cope objectively addressed the grounds of appeal. In dealing with the procedural failings she was far more candid than most managers would have been. As to the substance I am of the view that she had reasonable and proper cause to come to the conclusion that she did. As part of that conclusion was a decision not to recommend a reinvestigation partly on the basis of the passage of time.

57. Unsurprisingly Mr Jivanji complains that HMRC's own admitted delays in the matter are being turned against him. However Mrs Cope could only deal with the matter as it stood in July 2016. She concluded that a reinvestigation would bring nothing new to the party and that it would not affect the outcome ie the appeal would still have been refused. In my view there is ample evidence for that conclusion.

58. As I have said repeatedly the essence of Mr Jivanji's complaints in the grievance are relatively straightforward and have been addressed in these conclusions. Again as I have said before document 89(a) led Mr Jivanji to a time consuming and to some extent self destructive process. It is clear that from then on he had lost trust in Mr Patel. See for example the lengthy defensive notes he makes after every meeting with Mr Patel.

59. Were it not for the delays in deciding the grievance, a hole which HMRC has dug for itself, I would have found that HMRC has acted with reasonable cause and thus there would have been no breach of the implied term of trust and confidence.

60. However in my judgment the delays do amount to a breach of the implied term of trust and confidence and were in Mr Jivanji's mind at the point that he resigned.

61. It follows therefore that the final issue to be determined is whether Mr Patel affirmed the contract by continuing to work after the delay in Mr Shields' part of the grievance process.

62. As to the law both Counsel refer me to the cases of **W E Cox Toner, (International) against Crook** [1981] IRLR 443 and **Mari (Colmar) against Reuters Limited** UK EAT 0539/13 unreported. Mr Bidnell-Edwards also cites **Harvey** as follows:-

“Even where there is a breach the employee may choose to give the employer the opportunity to remedy. The employee will not then be prejudiced if he delays resigning until the employer's response is known.”

63. Mr Bidnell-Edwards also refers as a matter of evidence to the Claimant's witness statement at paragraph 188 and 189 in relation to the granting of a reduction in working hours. I do not accept that the granting of that application was the Respondent giving the Claimant time to decide whether or not to resign. It seems to me that the law is perhaps best summarised by the paragraph which Mr Sadiq cites from the judgment in the **Toner** case as follows:-

“It is accepted by both sides as we think rightly that the general principles of law of contract apply to this case, subject to such modifications as are appropriate to take account of the factors which distinguish contracts of employment from other contracts. Although we were not referred to cases outside the field of employment law, our researches have led us to the view that the general principles applicable to a repudiation of contract are as follows. If one party, the guilty party commits a repudiatory breach of contract, the other party, the innocent party can choose one of two courses: He can affirm the contract and insist upon its further performance or he can accept the repudiation in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses: If he once affirms the contract, his right to accept the repudiation is at an end. But he is not bound to elect within a reasonable or at any other time. Mere delay by itself unaccompanied by any express or implied affirmation of the contract does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation. See **Alan against Robles** [1969] IRLR 1193. Affirmation of the contract can be implied. Thus if the innocent party calls on the guilty party for further performance of the contract he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract. However if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation.”

64. Mr Bidnell-Edwards argues that in pursuing the internal grievance procedure Mr Jivanji was doing no more than allowing HMRC to remedy the breach. On the other hand Mr Sidiq argues that this is a case of the type which Bristow J was referring to in the case of **Hunt v British Railways Board** [1979] IRLR 379 where he said as follows:-

“It may be, it may not, that if he had cut the cable after issuing his originating application he would have had a good constructive dismissal case. But the one thing which is absolutely clear is that in the constructive dismissal situation the law does not allow you to have your cake and eat it, and you must not go on acting as if you were employed when what you were trying to say is I am not.”

65. In the case of **Hadji against St Luke’s Plymouth**, his Honour Judge Jeffrey Burke QC summarised the position as follows:-

“The essential principles are that:-

(i) The employee must make up his/her mind whether or not to resign soon after the conduct of which he complains. If he does not do so he may be regarded as having elected to affirm the contract whereas having lost his right to treat himself as dismissed; **Western Excavating against Sharp** [1978] ICR 221 as modified by **W E Cox Toner International Limited against Crook** [1981] IRLR 443 and **Cantor Fitzgerald International against Bird** [2002] EWHC 2736.

(ii) Mere delay of itself unaccompanied by express or implied affirmation of the contract is not enough to constitute affirmation but it is open to the Employment Tribunal to infer implied affirmation from prolonged delay. See **Cox Toner**, paragraph 13, page 446.

(iii) If the employee calls on the employer to perform its obligations under the contract or otherwise indicates an intention to continue the contract, the Employment Tribunal may conclude that there has been affirmation: **Fereday against South Staffordshire NHS Primary Care Trust** UK EAT 0513/ZT.

(iv) There is no fixed time limit in which the employee must make up his mind; the issue of affirmation is one which subject to these principles the Employment Tribunal must decide on the facts; affirmation cases are fact sensitive: **Fereday** paragraph 44.”

66. This is not an easy point to determine and I further have in mind that a successful Claimant who has not pursued the relevant parts of the ACAS Code of Practice may stand to have his award of compensation reduced, see Section 207(a) of the Trade Union and Labour Relations (Consolidation) Act 1992. None of the cases cited to me by either Counsel deal with affirmation by way of pursuit of a contractual grievance process.

67. On balance I consider that this is a case where Mr Jivanji has affirmed the contract by continuing to pursue the appeal following the repudiatory breach which the delay in Mr Shields' process constituted. This is a case where Mr Jivanji was seeking to both have his cake and eat it. His complaint of unfair constructive dismissal is therefore dismissed.

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Employment Judge Blackwell

Date

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS